

Did the ALJ err in determining that claimant's left knee injury was causally related to her accident of November 22, 2009, such that it arose out of and in the course of her employment with respondent as opposed to being a preexisting condition? Respondent contends that claimant failed to mention her left knee pain for two months after the November 22 accident. Additionally, respondent contends that neither claimant nor Dr. Wendt were able to provide an explanation as to how the accident to her right shoulder led

to a left knee injury. Claimant contends that the left knee injury occurred at the same time as the right shoulder injury, as she was struggling with a resident of respondent's establishment.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order For Medical Treatment should be affirmed.

Claimant has been employed by respondent in one of several capacities for 20 years. On November 22, 2009, she was a night teaching counselor, working with developmentally disabled adults in a residential setting. On that date, claimant was dealing with a particularly aggressive adult who had, in the past, busted out windows, knocked holes in walls, attacked other residents and attacked teachers. At between 2:00 a.m. and 3:00 a.m., this resident became aggressive and struck claimant in the face. A struggle ensued, and claimant suffered an injury to her right shoulder. Claimant described the struggle as lasting for from 15 to 20 minutes, with her being underneath the attacker most of the time. Claimant, at one point, was shoved into a bench near a shower and may have struck the side of her left knee on the bench, but she is not sure. The assailant is described as being 6 feet 2 inches and weighing about 190 pounds. He was larger than claimant and had violent tendencies. He struck claimant with his fists multiple times during the attack. Claimant finally managed to escape into a laundry room with an automatically locking door.

Claimant was referred to Dr. Geist for treatment. Dr. Geist recommended a referral to an orthopedic surgeon, but that was initially refused. Claimant did not initially tell Dr. Geist of left knee pain. She described her condition as having been "beat up totally".¹ The first mention of left knee pain after this incident occurred in the medical report of Dr. Wendt on January 27, 2010.

However, claimant's past medical history is significant in that she was diagnosed with bilateral knee chondromalacia patellae and osteoarthritis in her right knee in 2004. This diagnosis was made by her treating family doctor, Christopher Penn, M.D. The right knee was noted to be worse than the left. In October 2007, claimant was diagnosed with significant degenerative joint disease (DJD) in the right knee. It was noted that claimant had reasonable range of motion in her left knee, which Dr. Penn described as her "normal

¹ P.H. Trans. at 32.

knee”, with good stability.² Claimant was described as “obese” in 2004,³ she weighed 275 pounds in 2007, and weighed 299 pounds by October 7, 2009.

On October 7, 2009, claimant was examined by Dr. Penn. Claimant was experiencing bilateral knee pain and had experienced some falls secondary to the knee pain. She was instructed to contact Dr. Wendt at that time for the knee pain.

In his May 3, 2010, report, Dr. Wendt discussed an increase of claimant’s pain and discomfort in her left knee after the accident at work. He opined that she more than likely sustained an injury of her medial collateral ligament, or MCL, at the time of the attack.⁴ He found it significant that claimant experienced an increase of pain and discomfort in her left knee following the injury. The description of the accident, as noted above, would make one “assume that she also injured her knee”.⁵ Dr. Wendt determined, within a reasonable degree of medical probability, that claimant injured or even tore her medial collateral ligament in her left knee as a result of the work-related accident.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁶

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.⁷

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁸

² P.H. Trans., Resp. Ex. A.

³ *Id.*

⁴ P.H. Trans., Cl. Ex. 1.

⁵ *Id.*

⁶ K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

⁷ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁸ K.S.A. 2009 Supp. 44-501(a).

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁹

The ALJ determined that claimant satisfied her burden of proving that the injury to her left knee occurred, at least partially, as the result of the accident on November 22, 2009. This Board Member agrees. The description of the attack is graphic. The incident lasted for up to 20 minutes, with a violent resident standing 6 feet 2 inches, weighing 190 pounds, being about 22 years old, with a history of violence. The fact that claimant might not note every injury after being punched with fists for that long is no surprise. Claimant described her condition as being “beat up totally”. The medical evidence displays preexisting knee problems, but claimant testified that her left knee condition had worsened after the attack. Additionally, the medical reports appear to display the right knee as the most damaged before the attack. After the attack, the left knee clearly displayed the more significant symptoms. The preliminary award of benefits for the left knee is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven, by a preponderance of the credible evidence, that her need for medical treatment to her left knee stems, at least in part, from the accident and injuries suffered during the attack on November 22, 2009. The award of preliminary benefits by the ALJ is affirmed.

DECISION

⁹ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

¹⁰ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Medical Treatment of Administrative Law Judge Brad E. Avery dated July 1, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2010.

HONORABLE GARY M. KORTE

c: Timothy G. Riling, Attorney for Claimant
Clinton D. Collier, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge